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No. 96-1577

Supreme Court, U. S.

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In The
Supreme Court of the United States

October Term, 1996

STATE OF ALASKA,

Petitioner,

v.

NATIVE VILLAGE OF VENETIE
TRIBAL GOVERNMENT, et al.,

Respondents.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit

BRIEF OF AMICI CURIAE ALASKA FISH & WILDLIFE
FEDERATION AND OUTDOOR COUNCIL, INC. AND
ALASKA FISH AND WILDLIFE CONSERVATION
FUND, INC. IN SUPPORT OF PETITIONER

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INTERESTS OF AMICI

Amici are Alaska organizations whose members are united by their interests in protecting Alaska's natural resources and continuing successful conservation policies implemented under that State's constitution.¹ The decision below threatens those interests and resources by fracturing a system of state management in which Venetie and the other Native villages have participated and benefited along with all Alaskans.

The Alaska Fish and Wildlife Conservation Fund, Inc. ("Conservation Fund") is made up of approximately 1,200 individual members. The Conservation Fund's charter purposes include: educating the public on conservation of fish and wildlife resources, including the American hunting, trapping and fishing heritage; and litigating where necessary to protect natural resource rights enshrined in the Alaska Constitution. The Conservation Fund is an Alaska nonprofit charitable and educational organization (registered under IRC 501(c)(3)).

The Alaska Fish and Wildlife Federation and Outdoor Council, Inc., ("AOC") is a state-wide umbrella organization of 43 local member organizations representing over 10,000 members. (Those member associations are listed in Appendix A.) AOC's purposes include: protection of Alaska's renewable natural resources, advocating professional and scientific resource management, and participation in regulatory, legislative, judicial and public

¹ No person other than Amici (including those shown in Appendix A) have made monetary contribution to the cost of preparing this brief and no party's counsel is author. This brief is filed with the consent of the parties and their letters of consent have been lodged with the Clerk of this Court.

policy processes affecting these resources, including equality in access to and use of these resources required under the Alaska and United States Constitutions. AOC is an Alaska nonprofit corporation (registered under IRC § 501(c)(4)).

Individual members interests range from bird watching, nature photography, and scientific study to hunting and fishing and wild food gathering. Many have historically depended on hunting, trapping, and fishing for a predominant supply of meat and fish (a lifestyle choice – sometimes a necessity – recognized by the Alaska Constitution and laws).

Amici have been recognized by courts to have standing to protect those resources and the environment of Alaska (*Alaska Fish & Wildlife Fed'n & Outdoor Counc. v. Dunkle*, 829 F.2d 933 (9th Cir. 1987) *cert. denied, sub. nom., Alaska Fed'n of Natives v. Alaska Fish & Wildlife Fed'n and Outdoor Counc., Inc.*, 485 U.S. 988 (1988)). (AOC's interest in protection of migratory birds gives standing to seek injunction against the Federal Government permitting illegal out-of-season hunting); discussed in *Fund for Animals, Inc. v. Lujan*, 962 F.2d 1391, 1395-97 (9th Cir. 1992) (noting that AOC had standing to challenge federal actions harming "aesthetic and environmental well-being" because of injuries to members "who wish to hunt, photograph, observe or carry out scientific studies.")

The holding of the Ninth Circuit that Venetie's 1.8 million acres are "Indian country" likely presages a similar conclusion as to 44 million other acres of Alaska transferred under the Alaska Native Claims Settlement Act, "ANCSA", Pub. L. No. 92-203, 85 Stat. 688 (codified as amended at 43 U.S.C. § 1601 *et seq.*) (1971). This immense acreage is scattered across Alaska and across

the migratory routes of important fish and wildlife resources ranging from salmon to caribou. The probable further result in the Ninth Circuit is that such "Indian country" will be held not fully subject to state conservation and management so that such natural resources may be decimated in disregard of Alaska law, whenever they are found in "Indian country" areas – often briefly while on annual migration.

The creation of one 1.8 million acre "Indian country" threatens to impede or destroy the unified, scientific management by the State of Alaska which has protected and restored such resources since the State assumed management, as guaranteed by the equal footing provision of the United States Constitution. The creation of Two Hundred Twenty-Six "Indian countries" could create a "management" disaster because of the migratory nature of most wildlife. Many fish runs, herd migration routes, and flyways pass through several separate ANCSA land areas. A repeat of the pre-statehood depletion of Alaska's salmon runs is the fear of Amici.

This probable result of the decision below conflicts with the promises made by Congress in the Statehood Act and ANCSA that Alaska would have full control over its own destiny and resources.

Alaska is miraculous and unique in many ways. It is the only state in which many wildlife resources have been greatly increased in the last half-century under state management, even in the face of pressure from increasing population and development, as well as great technological increase in the ability to harvest with powerful ocean fishing vessels, snowmobiles and high-powered weapons replacing traditional tools and weaponry. For only one notable example, salmon runs have grown to a recent

annual average catch of over 180 hundred million from an historic low of 25 million the year Congress granted statehood.

Judge Fernandez hinted at the threat to the interests of Amici, forecasting a:

[B]lizzard of litigation throughout the state of Alaska as each and every tribe seeks to test the limits of its power over what it deems to be its Indian country. . . . include(ing) claims to freedom from state . . . regulation . . . assertions of sovereignty over vast areas of Alaska.

Ninth Circuit opinion, app. 1a to Pet. for Certiorari at 36a.

Confirming this threat, the counsel for Respondents have already announced conservation impacts of the decision below (which):

will apply to virtually all other native villages. Specifically, the additional powers that the Tribe will have as a consequence of Indian country status include the authority to . . . manage fish and game (although the extent of such authority is unclear) . . .

NARF, *Indian Country in Alaska: The Venetie Decision*, in *Justice* at 1 (Spring 1997) quoted in *State of Alaska Reply Br. for Pet.*, p. 2.

The wildlife resource and its management is a central issue in this litigation and litigation which will inevitably ensue if the decision of the Ninth Circuit is not reversed. For Amici, and most Alaskans, the primary interest is always the resource because the Alaskan way of life revolves around fish and wildlife.

In this key area of natural resource conservation, Congress has clearly authorized state, not federal, superintendence over Alaska lands, specifically including all ANCSA lands. The Native villages' interest are accommodated in this *state* system (and indeed Venetie and Arctic

Village continue to participate – and benefit – as provided by Alaska *state* law).

SUMMARY OF ARGUMENT

Our argument focuses on conservation of natural resources which is of primary import to Amici – and other Alaskans – and on Congress' confirmation of state authority.

While joining in the historical and statutory arguments of the State that ANCSA land is not "Indian country," we further illustrate how congressional direction of management and conservation of natural resources in Alaska historically did not involve special federal "superintendence" over the Natives. An exception which proves this rule is the Annette Island Reserve, created by statute for 800 Metlakatla Indians moved from Canada in 1887. Congress did provide some special federal control over this reservation, and fisheries. *Metlakatla Indian Community v. Egan*, 369 U.S. 45 (1962). (This court still concluded the reserve was not "Indian country within the meaning of 18 U.S.C. 1151-53." *Id.* at 52.)

Decisions of this Court considering natural resources management before and after statehood confirmed the policy of treating Alaskans the same, with no *special* federal superintendence for Natives. *Hynes v. Grimes Packing Co.*, 337 U.S. 86 (1940) (special fishery for "natives and their licensees" invalid); *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962) (Alaska state laws banning fish traps may be applied to Indians).

The pre-statehood conservation policies of the Federal Government left much to be desired. The salmon

runs of Alaska were at a long-time historic low at the end of federal management and as a consequence of that management (*Organized Village of Kake*, concurring opinion of Douglas noting the disastrous impact of federally-authorized fish traps: "The Hearings . . . are replete with examples of the impact on people and the Alaska economy of the salmon depletion. This depletion also has a serious effect on wildlife." 369 U.S. at 82, n.5).

A policy of nondiscriminatory resource management was upheld by this Court, *Hynes*, supra, and was later enshrined in the Alaska Constitution, Art. VIII. Indeed, the *Hynes* decision of this Court has been cited and quoted by the Alaska Supreme Court as the source of Alaska constitutional Art. VIII, §§ 3, 15, 17. (*McDowell v. State of Alaska*, 785 P.2d 1, 6-9 (Alaska 1989)).

Congress expressly reiterated in the Alaska Statehood Act what is constitutionally required: that the State entered the Union "on an equal footing with the other States in all respects whatsoever" with all the powers and properties of the original states. Pub. L. No. 85-508, 72 Stat. 339 (1958). Among those powers, of course, are sovereignty over wildlife resources.

The Alaska Statehood Act also specifically provided that "Submerged Lands Act of 1953 [is] applicable to the State of Alaska and the said State [has] the same rights as do [other] States thereunder." Pub. L. No. 85-508 § 6(m), 72 Stat. 339, 340-41 (1958). That 1953 act transferred title and ownership of the lands beneath navigable waters and "the right and power to manage . . . said lands and natural resources, all in accordance with applicable State law. . . . to the respective States. . . ." See, also, *Idaho v. Coeur d'Alene Tribe of Idaho*, ___ U.S. ___, 117 S. Ct. 2028,

2040, et seq. (1997), (constitutional basis of equal footing doctrine).

The same year as statehood, the same Congress extended Public Law 280 jurisdiction to Alaska, 72 Stat. 545 (1958). The language of Public Law 280 included a potential exemption from State jurisdiction over wildlife matters by providing that nothing therein:

[S]hall deprive any Indian or Indian tribe, band or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

118 U.S.C. § 1162(b).

In *Metlakatla*, 369 U.S. 45, there was a federal statute arguably providing federal authority over fishing (26 Stat. 1095, 1101, 48 U.S.C. 358). However, this Court held Alaska law did apply, further noting the statute argued to make an exception did not apply to other Natives "subjecting Metlakatla to rules and regulations of the Secretary of the Interior is *unusual*." *Metlakatla*, 369 U.S. at 53, emphasis added.

In the companion case *Organized Village of Kake*, 369 U.S. 69, this Court considered similar challenges by other Alaska Indians and concluded that the State's conservation laws did apply to all areas of Alaska.

Congress, through ANCSA, resolved any ambiguity and all remaining claims and in so doing terminated federal superintendence. As regards fish and wildlife management, ANCSA included three provisions. First, it revoked Native "reserves set aside either by legislation or

Executive or Secretarial Order" (Section 19).² Second, ANCSA extinguished aboriginal title or any aboriginal "hunting or fishing right" (Section 4(b)). Finally, it generally extinguished all other claims:³

[A]ll claims against the United States or State . . . based on claims of aboriginal right, title, use, or occupancy of land or water areas . . . or that are based on any statute or treaty of the United States . . . or based on the laws of any other nation.

ANCSA, Section 4(c).

This ANCSA settlement was expensive for the State of Alaska and her citizens. Five hundred million dollars of the moneys transferred to the Native Fund in consideration for the settlement were expressly to come from funds due to the State. In monetary terms, this was more than the federal budget contributed to the settlement fund (Section 9).

The lands – ultimately 44 million acres – could be selected by the village corporations and regional corporations and were also to be taken from land base which the State might otherwise claim.

The positive result was to reconfirm state jurisdiction over all these lands, and most importantly, continued state jurisdiction to manage and conserve the fish and wildlife and other natural resources for all Alaskans.

² With the exception of Annette Island Reserve (Metlakatla), in Section 19(a) of ANCSA.

³ The claim of "Indian country" herein was probably included.

From the pre-statehood "decline of Alaska salmon"⁴ to under 25 million catch, State management has increased that catch to a recent average 186.6 million.⁵

The State management of the Venetie lands as part of the 34 million acres surrounding it which make up State GMU 25 has long been implemented with the participation of the village(s) through representation on committees established by state law for this purpose. (Venetie and Arctic Villages each have two representatives by state regulation.)

Congress expressed no intention that the Federal Government retain superintendence over the wildlife resources migrating over or living on ANCSA lands. These lands were all transferred to state-chartered corporations, in fee – subject to laws of the State as to trespass, wildlife, environmental and other regulation.

Access to these lands – and its restriction under trespass law – is also a matter of state law. The federal statute controlling hunting and fishing on "Indian trust lands" (18 U.S.C. § 1165) does *not* apply to ANCSA land.

More recently, Congress confirmed that no federal superintendence was extended to ANCSA lands when it enacted the Alaska National Interest Lands Conservation Act (ANILCA), No. Pub. L. 96-487, 94 Stat. 2371 (1980), avowedly to complete the process of land disposition in Alaska.

The Ninth Circuit has held that ANILCA implies some federal regulation over fish and wildlife on "public" or "federal" lands in Alaska therein described. *Alaska*

⁴ Cooley, R.A. 1963. Politics and conservation: The Decline of the Alaska Salmon. Harper and Row, New York.

⁵ Savikko, H., Alaska Commercial Salmon Catches, Report of Alaska Dept. of Fish and Game, 1996 Supp.

v. Babbitt (Katie John), 54 F.3d 549 (9th Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S. Ct. 272 (1995).

ANILCA defines "public lands":

(2) The term "Federal land" means lands the title to which is in the United States after December 2, 1980.

(3) The term "public lands" means land situated in Alaska which, after December 2, 1980, are Federal lands, except - [exception not relevant here]

ANILCA Sec. 102, 16 U.S.C. § 3102 (1980).

The Venetie lands were transferred from the United States to Native corporations in 1973 and still remain in fee ownership. The same is true of the ANCSA lands.

It is thus uncontested that Congress, through ANILCA did not allow any federal authority or superintendence over these lands. There is no suggestion, in statute or legislative history, even as interpreted by the Ninth Circuit, that any federal regulatory authority authorized by Congress under ANILCA extends to the Venetie lands at question, nor to any other of the 44 million acres transferred in fee pursuant to ANCSA. These are neither "federal land" nor "public lands" under the above-quoted statutory definition.

Thus ANILCA confirms, contrary to the decision below, that there is no *federal superintendence* over these lands in this most important subject area of natural resources and subsistence use. Rather, ANILCA attests Congress intended the State to continue such jurisdiction over ANCSA (fee) lands. The ANCSA lands are not "Indian country."

ARGUMENT

The case below will likely be applied to the 44 million acres of lands passed to Native corporation ownership under ANCSA. The circuit court has already held this decision provides: "the appropriate standard for determining whether a dependent Indian community exists." *Alyeska Pipeline Serv. Co. v. Kluti Kaah Native Village*, 101 F.3d 610, 613 (9th Cir. 1996).

In all of these lands, the State of Alaska has heretofore exercised jurisdiction over fish and wildlife, fulfilling its trust responsibility to restore and manage these resources for all Alaskans. This Court has long held such power is an essential historic power of states:

We take it to be the correct doctrine in this country that the ownership of wild animals, so far as they are capable of ownership, is in the state, not as proprietor but in its sovereign capacity, as a representative and for the benefit of all its people in common.

Geer v. Connecticut, 161 U.S. 519, 530 (1896).

Later decisions held that the doctrinal basis is not "ownership" while reaffirming the States' police power:

[C]ases are consistent in recognizing that the retained interests of States in such common resources as fish and game are of substantial legal moment, whether or not they rise to the level of a property right. . . . Barring constitutional infirmities, only a direct conflict with the operation of a federal law . . . will bar the state regulatory action.

Douglas v. Seacoast Prods., Inc., 431 U.S. 265, 288 (1977) (Rehnquist, J., concurring in part and dissenting in part (citations omitted)).

The Native villages have been, and remain, special participants in, as well as beneficiaries of, State management. Under Alaskan law, Committees are established to provide the regional resource management input for all Alaska and each specifically includes representatives of villages. Venetie, as well as Arctic Village has such representation under state law over state management on the lands involved in this case (as well as millions of acres of the adjoining lands which the villagers are free to use).

It was not historical accident, but reflects the priorities of Alaskans, that the same special election in which Alaskans ratified their new constitution ("Ordinance 1") they approved an Ordinance which prohibited the use of fish traps for the taking of salmon in Alaska waters ("Ordinance 3").⁶

Two decisions of this Court discussing fish traps, their effect on this one important natural resource, and the new State's efforts to cure the problem (in the face of federal authorization of contrary Native practices) are in *Metlakatla*, supra, and *Organized Village of Kake*, supra.

Fish traps are only one example of the destructive practices allowed under federal management of Alaska resources. In *Hynes*, the dissent had noted the "rapid and virtually unrestrained depletion and destruction of the fishery. . . ." Supra at 131.

The Federal Government does not have the same constitutional trust responsibilities as does the State here.

⁶ Ordinance 2 provided for the election of two United States Senators and one United States Representative.

Other political priorities may control and did so historically to the detriment of Alaska's resources.⁷

Congress was well aware of the problem and granted all power to Alaska necessary to conserve or restore the resources. As this Court said of a different statute: "The destruction of anadromous fish in our western waters is so notorious, that we cannot believe that Congress through the present Act authorized their ultimate demise." *Udall v. Federal Power Comm'n*, 387 U.S. 434, 437-8 (1967).

Statehood was followed by Public Law 280 jurisdiction for Alaska, and State jurisdiction over these lands was finally confirmed by Congress in ANCSA.

We have neither the rhetorical skill nor pages of brief to detail the natural resources involved. They have continued to thrive, and often increase, under the special system of state protection described below.

I. State Conservation Jurisdiction Includes - and Benefits - Venetie.

The Alaska Constitution was expressly approved by Congress and devotes an entire article to natural resources. That Congress thereby authorized and intended State control over fish and wildlife is separately confirmed by the provision of a one-year delay to allow the State to adopt its management and thereby fully replace federal management. (Alaska Statehood Act, Section 6 (e) discussed in *Metlakatla*:

⁷ Similar federal policies continue. See *Alaska Fish and Wildlife Fed'n & Outdoor Council, Inc. v. Dunkle*, 829 F.2d 933 (9th Cir. 1987) (requiring Interior to comply with Migratory Bird Treaty Act but finding enforcement to be discretionary).

When Alaska was established as a State, Congress withheld jurisdiction over her fisheries until she had made adequate provision for their administration. Fn. 2: " . . . Alaska adopted a comprehensive fish and game code on April 19, 1959, Alaska Law 1959, c. 94, and received full control over her resources soon afterward."

Metlakatla, 369 U.S. at 47, including n.2 (emphasis added).

The first Alaska Legislature immediately adopted a comprehensive conservation code (including the ban of fish traps, previously approved by the people, Alaska Stat. 16.10.070). The code established a 15-member Board of Fish and Game to undertake the daunting project. The new agency had a "jump start" since the Territorial Legislature had funded a Department of Fisheries which, though without regulatory authority, had commenced research and study, including hearings to analyze the (failing) federal regulatory programs and create a better system.

Resource management authority is now shared between the Boards of Fisheries and Game. Alaska Stat. 16.05.221. The Board of Fisheries regulatory authority is found primarily in Alaska Stat. 16.05.251. The Board of Game has regulatory authority which extends to game, including birds, and is found primarily in Alaska Stat. 16.05.255.

After conservation, the first priority for consumptive use of Alaska's fish and game is subsistence. Alaska Stat. 16.05.258. This statute applies to each Board and requires each to identify fish stocks or game populations "customarily and traditionally taken or used for subsistence." A reasonable opportunity for all Alaskans to participate in subsistence is required (except in "non-subsistence" areas where "dependence upon subsistence is not a principle

characteristic of the economy, culture, and way of life. . . . " Alaska Stat. 16.05.258(c)). The Alaska Constitution requires that all Alaskans share in this benefit. (See *McDowell*, 785 P.2d 1 (Alaska 1989)).

The Fisheries and Game Boards are confirmed in joint legislative sessions and serve fixed and staggered terms, to assure independence and a kind of check-and-balance with the Commissioner of Fish and Game appointed by the Governor. Alaska is divided into 26 Game Management units ("GMU") reflecting the habitat and migration of the species of interest. Similarly, the Board of Fisheries has divided the State into 13 major regulatory areas for fishing. These areas are often further divided for fine-tuned regulation. See, generally, Alaska Admin. Code tit. 5 § 39.120.

An important management role is played by a statewide system of fish and game advisory committees (Alaska Stat. 16.05.260). These are established and their jurisdictional areas defined in permanent regulation, Alaska Admin. Code tit. 5, § 96.021.

The GMU in which this Venetie area is found is Unit 25, which is itself composed of 4 sub-areas (Alaska Admin. Code, tit. 5 § 92.450(25)(A, B, C, D)). A map of this area as adopted is attached as Appendix B for ease of reference.

GMU 25 encompasses the Yukon River basin upstream from Hamlin Creek. The northern boundaries of area GMU 25 A, B and D are the Phillip Smith Mountains and Davidson Mountains, and the western is the Canadian border. Area 25 encompasses 53,116.9 square miles or 34 million acres, of which the Venetie area is 1.8 million. (See, App. B, GMU 25 map).

Management for GMU 25 is within the authority of several Advisory Committees (Alaska Admin. Code, tit. 5 § 97.005 (vii). Of those, the "Yukon Flats" Committee generally deals with 25A, which includes the Venetie lands herein and surrounding lands.

By state regulation, the Yukon Flats Advisory Committee specifically includes delegates from *both* villages which make up Venetie: "Arctic Village two representatives . . . [and] Venetie two representatives" as well as two each from several other Native villages, all of which are located in the management area. Alaska Admin. Code tit. 5 § 96.216(D).

These advisory committees are required to be "well informed on the fish or game resources of the locality . . . hold public hearings and forward regulatory recommendations to the Boards aforementioned." Alaska Stat. 16.05.260. The statute also allows the Advisory Committees to be delegated authority to make in-season emergency changes. Alaska Stat. 16.05.260. (This is infrequently done).

The Commissioner has authority to adopt "Emergency Orders" such as closing fisheries and other seasons (Alaska Stat. 16.05.060). The Commissioner may also "set aside and make null and void [the] opening of seasons set by the advisory committees." Alaska Stat. 16.05.260.

This is a complex system, historically evolved to meet the needs of the resource and of all Alaskans. The complicated nature of management of migrating species is illustrated in the recent decision of *Stepovak-Shumagin Set Net Ass'n v. State of Alaska, Bd. of Fisheries*, 886 P.2d 632 (Alaska 1994). The salmon regulation in question was proposed by an advisory committee (including Native village representatives) and amended through hearing. It

affected numerous runs of salmon, of several species and rivers of origin, as well as competing fishing gear types and competing interests from two Native villages (each with representation on that area's committee under state law).

The need for unified state management is illustrated by this case. The Venetie area in question seems huge, 1.8 million acres, but it is only a part of the habitat area for wildlife populations (generally, GMU 25; as shown in Appendix B). As with other areas to which Native corporations were granted title as part of ANCSA, the Venetie area straddles migratory routes of fish, especially salmon, big game and birds. All these resources spend only a small part of their lives in the Venetie area. Species of illustrative interest which pass through the Venetie area include Yukon River salmon, moose and the Porcupine herd of caribou.

Venetie (village) is located on the north side of the Chandalar River about 45 miles from the confluence with the Yukon River, and the Venetie area extends to that river. Salmon fisheries in the Yukon River include king and chum salmon. These salmon are of particular significance since many Yukon chinook spawn in Canada. The chinook salmon runs are subject of negotiated management and recurring dispute with that Nation. (See Article VIII to the Pacific Salmon Treaty, Treaty between United States and Canada, signed at Ottawa January 28, 1985, T.I.A.S. No. 11091, which article specifically deals with the Yukon River salmon.)

Also of special interest is the renowned Porcupine caribou herd, which use GMU 25 and the Venetie area for some part of each year. The international scope of the

Porcupine herd's importance is also reflected in an "International Conservation Agreement between Canada and the United States on the Conservation of the Porcupine Caribou herd," signed at Ottawa, July 17, 1987 (T.I.A.S. No. 11259).

Harvest management is just one element of the State's responsibilities under the Alaska Constitution to protect the resources and environment for the benefit of all Alaskans. The decision below could displace not only fish and wildlife management but a panoply of state environmental and habitat statutes and regulations.

One less obvious example is the creation and enforcement of environmental standards, which will be blocked by the existence of "Indian country." The Ninth Circuit has held a state may not enforce air or water quality standards in Indian country. (*Washington Dep't of Ecology v. EPA*, 752 F.2d 1465 (9th Cir. 1985)). There is no present authority to supplant the State's efforts in this subject area.

We have noted only a few examples of important Alaskan resources which may not survive disruption of state management: salmon runs and such migratory ungulates as the Porcupine caribou herd. Numerous other species of fish and wildlife such as moose owe their health and survival to the system of unified management by the State of Alaska and would be threatened by the "Balkanization" charted by the decision below.

II. History of Wildlife Management Confirms State Authority: Congress Extinguished All Sources of Federal Superintendency.

The State of Alaska has summarized the jurisdictional history and shown there is no "Indian country." We

shall briefly focus on wildlife management to show that Congress generally did not provide special or exclusive Indian rights in wildlife, even before statehood. After statehood, Congress has repeatedly confirmed the jurisdiction of the State in this subject area and extinguished any claim of federal superintendence.

When the Territorial Organic Act provided for the formation of a territorial legislature in 1912, the laws applied equally to all persons in Alaska. (Pub. L. No. 62-334, 37 Stat. 512 (1912)). However, among the subjects excluded was wildlife management.

Management of these important resources was temporarily retained in the Federal Government. The need for conservation was early apparent:

Commercial salmon fishing has become vital for Alaska's economy, but its exploitation seriously threatened the resource even before the turn of the century. See Gruening, *The State of Alaska* (1954), pp. 75, 97. Congress in 1889, in 1896, in 1906, and again in 1924 enacted conservation measures, prohibiting any obstruction of waters to impede salmon migration, limiting the times and means of taking salmon, and authorizing the appropriate department to impose further restrictions.

Metlakatla, 369 U.S. at 46-47.

Each of these early federal conservation measures, as well as the Criminal and Civil Codes for Alaska, enacted by Congress were equally applicable to Natives as well as non-Natives (See, e.g., 30 Stat. 1253 (1899) and 31 Stat. 321 (1900)).

The lack of local control (and real enforcement) proved to be an increasingly glaring error, as the mismanagement of the resources became more and more apparent (see, e.g., *Hynes*, *infra*, referring to "the rapid and

virtually unrestrained depletion and destruction of the fishery." 337 U.S. at 131.

The general applicability in Alaska of all laws was further confirmed in 1924 when Congress granted Alaska Natives citizenship. Pub. L. No. 68-253, 43 Stat. 253 (1924).

That same year, Congress enacted the last of the federal "conservation measures," noted above in *Metlakatla*, 369 U.S. 45. The White Act, 43 Stat. 464 (1924), authorized federal regulation of Alaska fisheries, but there was no separate provision for Natives and, indeed, that Act prohibited any special rights. (Construed by this Court, it became a model for Alaska Constitution Art. VIII. See *McDowell v. State of Alaska*, 785 P.2d 1 (Alaska 1989).)

In 1932, the Secretary of Interior advised Congress: "In the United States statutes Alaska has never been regarded as Indian country. Letter from Ray Lyman Wilbur to the Hon. Edgar Howard (March 14, 1932, reprinted in *Hearing on S. 1196 before the Senate Comm. on Indian Affairs*, 72d Cong., 1st Sess. 15-16 (1932)).

Subsequent to the enactment of the definition in 18 U.S.C. § 1151 (1949), Executive Branch agencies consistently adhered to the view that Congress did not intend the "Indian country" definition to apply to Alaska.

In 1940, this Court considered the 1924 White Act in *Hynes*, 337 U.S. at 86, and concluded that the Act did not authorize a federal regulation of the Secretary of Interior permitting Natives special fishing rights, or treating them different:

[W]e think it clear that its proviso, "that no exclusive or several right of fishery shall be granted therein," applies to commercial fishing by Natives equally with fishing companies, non-residents of Alaska or other American citizens

and so applies whether those Natives are or are not residents on a reservation. We find nothing in the White Act that authorizes the Secretary of Interior to grant reservation occupants the privilege of exclusive commercial fishing rights. . . . "Exclusive," as used in Section 1 of the White Act, forbids not only a grant to a single person or corporation but to any special group or number of people.

Hynes, 337 U.S. at 122.

Even though this Court concluded that coastal waters (3000 feet around) could be added to the "reservation," the Court found *no* special federal superintendence (or dependence), which would justify special regulation. Neither the majority nor dissenting opinion suggested that such areas were "Indian country."

In 1958, an Assistant Secretary of the Interior Roger Ernst represented to Congress: "(T)he general understanding had been that the many Native villages in Alaska were not Indian country, . . . " Letter from Roger Ernst to the Hon. Emanuel Culler (February 25, 1958), reprinted in S. Rep. No. 1872, 85th Cong., 2d Sess. 3 (1958), reprinted in 1958 U.S.C.C.A.N. Vol. 2, p. 3347.

The same year, the 85th Congress enacted the Alaska Statehood Act. Pub. L. No. 85-508, 72 Stat. 339 (1958). At no time during those hearings was it argued that the land reserves made for the benefit of Alaska Natives were "Indian country." In the Alaska Statehood Act, Congress confirmed the general proposition the new state would have jurisdiction over all lands and citizens.

This Court considered the Statehood Act, Public Law 280, and several argued disclaimers and exemptions, ultimately concluding the State of Alaska had received complete jurisdiction in the companion *Metlakatla* and *Kake*

cases. This Court even confirmed with respect to Metlakatla a district court conclusion "the Reserve was not Indian country, within the meaning of 18 U.S.C. § 1151." *Metlakatla* at 52.

As Congress intended, all Alaska residents and all lands were to be generally subject to the jurisdiction of the Alaska State Legislature. After one year, the same was specifically to be true for all fish and wildlife matters.

This Court's decision in *Metlakatla* had discussed the argument that activities within the boundary of a reservation could be argued not subject to state jurisdiction where a "federal treaty, agreement or statute" provided "hunting, fishing or trapping" "right, privilege or immunity." Citing Pub. L. 280, 18 U.S.C. § 1162 (1970). ANCSA resolved these claims to make abundantly clear all such activity by all Alaskans would be subject to state management.

This was done by revoking the reservations and any "claim" of use or occupancy, and by expressly extinguishing hunting and fishing rights. *Id.* Thus, no Public Law 280 exemption would apply.

Thus when it enacted ANCSA, the 92d Congress reaffirmed full state jurisdiction over fish and wildlife on these lands.

III. The Alaska Native Claims Settlement Act Was Final Extinguishment of Indian Country And Confirmed State Jurisdiction Over Wildlife.

In 1971, the 92d Congress enacted ANCSA, Pub. L. No. 92-203, 35 Stat. 688 (codified as amended at 43 U.S.C. § 1601 *et seq.*) (1971). In exchange for the 44 million acres of land and \$965.5 million, section 4 of ANCSA "extinguished" all Native claims in Alaska.

ANCSA was referred to by Congressional Report as a "generous grant by almost any standard."⁸ As argued by the State of Alaska, the express provisions of ANCSA, as well as its legislative history, confirm that there remains no Indian country in Alaska.

Because fish and wildlife resources and their use is an important separate component of such analysis, we write separately to articulate why this conclusion is doubly true. ANCSA provided for extinguishment of claims of use and occupancy and finally, and expressly extinguished hunting or fishing rights:

(b) All aboriginal titles, if any, and claims of aboriginal title in Alaska based on use and occupancy, including submerged land underneath all water areas, both inland and offshore, and including any aboriginal hunting or fishing rights that may exist, are hereby extinguished.

85 Stat. 690, § 4(b), emphasis added.

Of particular relevant importance, the Act went on to separately extinguish any "claims" against the State:

(c) All claims against the United States, the State, and all other persons that are based on claims of aboriginal right, title, use or occupancy of land or water areas in Alaska or that are based on any statute or treaty of the United States relating to Native use and occupancy, or that are based on the laws of any other nation, . . .

85 Stat. 690, § 4(c).

⁸ Noting that over 40 million acres and nearly \$1 billion were provided for approximately 40,000 Natives living in villages and 55,000 total at 2195 H. R. No. 92-523, 92d Cong., 1st Sess. (1971), reprinted in 1980 U.S.C.C.A.N. 2195.

This was a most important part of the consideration for ANCSA's "generous grant by almost any standard." This section, alone, should end this "claim . . . against the State" that Venetie is "Indian country." There was more, however.

ANCSA also expressly revoked all (any) reservations, in Alaska, save Metlakatla. "Notwithstanding any other provision of law, . . . the various reserves set aside by legislation or by Executive or Secretarial Order for Native use or for administration of Native affairs, . . . are hereby revoked." ANCSA, § 19(a).

The revocation of the Venetie reservation should alone be sufficient effective to conclude it is no longer "Indian country." Congress has set forth three alternatives to qualify as Indian country. When it expressly *revokes* that status under the primary definition, courts may not reinstate the status where Congress has not chosen to do so:

If the reservation has been diminished, then [the land] within the historical boundaries of the reservation is not in "Indian country."

Hagen v. Utah, 510 U.S. 399, 401 (1994).

Thus, ANCSA provided a final answer to claims that hunting and fishing were somehow exempt from state jurisdiction and reaffirmed long standing policy that Alaska Natives were Alaskans and subject to the jurisdiction of the Alaska Legislature as was the land within and surrounding villages.

Congress also rejected several proposals when it considered ANCSA. One is noteworthy because it was proposed by the Alaska Federation of Natives, and recommended that "Native groups" be afforded the "option to incorporate under the Indian Reorganization

Act as an alternative to incorporation under Alaska law." This alternative also proposed that Native groups be given the option of having title conveyed "in fee simple to a trustee for the native group." § 2904, 90th Cong. 2d Sess (1965), reprinted in *Alaska Native Land Claims: Hearings on § 2906, et al. before the Senate Comm. on Interior and Insular Affairs*, 90th Cong., 2d Sess. 2-16 (1963).

After the passage of ANCSA, Venetie made a similar request to Interior to take this same land into trust, and Interior rejected the request concluding: "In light of the clear expression of congressional intent in ANCSA not to create trusteeship or a reservation system, it would be an abuse of discretion; for the Secretary to acquire lands in trust." DOI Opinion, Governmental Jurisdiction of Alaska Native Villages Over Land and Nonmembers, Sol. Op. M-36975, p. 112, n. 276 (January 11, 1993).

In ANCSA, Congress had rejected such trust proposals and other models of "Indian country" known and available from the lower 48 states. Instead, Sections 7(d) and 8(a) of ANCSA required Alaska Natives to organize corporations "under the laws of the State [of Alaska]." Section 14 then required the Secretary of the Interior to issue patents to state-chartered corporations which conveyed title to the land in fee simple (not trust).

Section 14(c)(3), applicable to most other villages, even required the village corporation to reconvey fee title to "no less than 1,280 acres" within the village either "to any Municipal Corporation in the Native Village or to the State in trust for any Municipal Corporation established in the Native village in the future."

This is an expression by Congress of intent that not only the Alaska State Legislature but even political subdivisions could exercise jurisdiction over the core of ANCSA-conveyed land.

Both the concurring opinion of Judge Fernandez below and the Amicus Brief of Shee Atika Corporation note the drastically inconsistent result if a tribal government were allowed to assert authority over ANCSA lands as "Indian country" and to control or even tax the Native corporations which now own the lands. As Shee Atika notes the members and beneficiaries while often overlapping are *different*. The lands and corporation stock could easily be rendered valueless either by tribal assertion of land-use control, or tax. (*McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819)). At least theoretically, non-members of the tribe could be argued not entitled to hunt and fish on lands of which they are part owners: an absurd or at least problematic system.

The legislative history further supports the conclusion that no "Indian country" remained. There is no mention of "Indian country" nor citation to 18 U.S.C. § 1151, a remarkable oversight if Congress' intent was to create or continue "Indian country."

When Alaska Governor Egan testified on H.R. 3100, the precursor to H.R. 10367, the Governor made clear one primary interest of the State; that there must be no remaining impediment to state jurisdiction over natural resources:

No Native claim to this land should be immune to the 'zoning' powers of the state, from jurisdiction over fish and game, water or air quality, or any other policy, natural resource or environmental regulation.

Alaska Native Land Claims: Hearings on H.R. 3100, et al., before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs, 92d Cong., 1st Sess. 128-29 (1971) (emphasis added). Those concerns were shared by the Congressional leaders as the following colloquy between chairman Aspinall and Representative John Kyl demonstrates:

Kyl: I would like to guarantee as far as possible that there is no possibility that these Native reservations will be considered at any time in the future as Native reservations or Indian reservations, knowing the tremendous problems that we have because of the Indian reservations in the forty-eight adjacent states. And there is a possibility - yes?

Aspinall: This troubles me, too, because it seems that the only possible way that we can do this is to find that these villages, wherever they may be, before they can take, must be incorporated under the laws of the State of Alaska which would be final determination of their position . . .

. . .
In other words, what my colleague is saying, if the State of Alaska has any laws on the maintenance of, enhancement of, protection of ecological values, then these citizens of Alaska should conform in these respects, too, is that correct?

Kyl: Yes.

Transcript of June 21, 1971 Executive Session of the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs, 92d Cong., 1st Sess. (1971). Record Group 233. Center for Legislative Archives. National Archives. Washington, D.C. (emphasis added).

The House Committee on Interior and Insular Affairs included what became section 2(b) of ANCSA and explained in its Report that:

The bill does not establish any trust relationship between the Federal Government and the Natives. The regional corporation and the village corporations will be organized under State law, and *will not be subject to Federal supervision except to the limited extent specifically provided in the bill. All conveyances of land will be in fee – not in trust.*

H.R. Rep. No. 92-523 at 9 (emphasis added), 92d Cong., 1st Sess. (1971), reprinted at 1971 U.S.C.C.A.N. Vol. 2, p. 2191. As frequently noted, with respect to fish and game, the supervision is state.

The House-Senate Conference Committee which sponsored the final version also prepared a Joint Statement which emphatically concluded: "Subsection 2(g) of the Conference Report is to be strictly construed and the Conference Committee does not intend that the lands granted to the Natives under this Act be considered 'Indian reservation' lands for purposes other than those specified in this Act. The lands granted by this Act are not 'in trust' and the Native villages are not Indian 'reservations.'" H.R. Conf. Rep. No. 92-746 at 40, 92d Cong., 1st Sess. (1971), reprinted at 1971 U.S.C.C.A.N. Vol. 2, p. 2247. These were both parts of Indian country definition, of course.

The history confirms both the specific argument that State jurisdiction over natural resources was intended, and the general conclusion that "Indian country" – or federal superintendence – was not intended by Congress.

When ANILCA was adopted in 1980, Congress further confirmed this by asserting federal jurisdiction (if at

all) only over public lands, defined as "lands situated in Alaska, which after December 2, 1980, are Federal lands . . . [which] means lands *the title to which is in the United States.* . . ." ANILCA § 102, 16 U.S.C. 3114 (1980), (emphasis added).

The Ninth Circuit has given the term "federal land" an expansive interpretation holding it includes some navigable waters in which the United States has reserved water rights.⁹ *Alaska v. Babbitt*, 54 F.3d 549. The same decision has also left standing a district court decision that federal regulatory authority over such lands could be implied. *Alaska v. Babbitt*, at p. 554, n.2 (It is probable, but not here relevant since those are *not* ANCSA lands, that state regulation over public lands is at least concurrent.)

ANCSA lands are simply *not* covered by ANILCA's definition of "federal lands" because these are fee lands. This confirms Congress asserted *no* federal control or "superintendency." This is final confirmation Congress did not intend these lands to be "Indian country."¹⁰

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⁹ The Alaska Supreme Court has reached the contrary result. *Totemoff v. State*, 905 P.2d 954, 962 (Alaska 1995).

¹⁰ A search of the legislative history of ANILCA also discloses no reference to "Indian country" as defined in 18 U.S.C. § 1151.

CONCLUSION

For the reason set forth above, and in the Brief of Alaska, the decision of the Ninth Circuit should be reversed.

DATED this 21, day of August, 1997.

Respectfully submitted,

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Attorney at Law
Attorneys for Amici

APPENDIX A

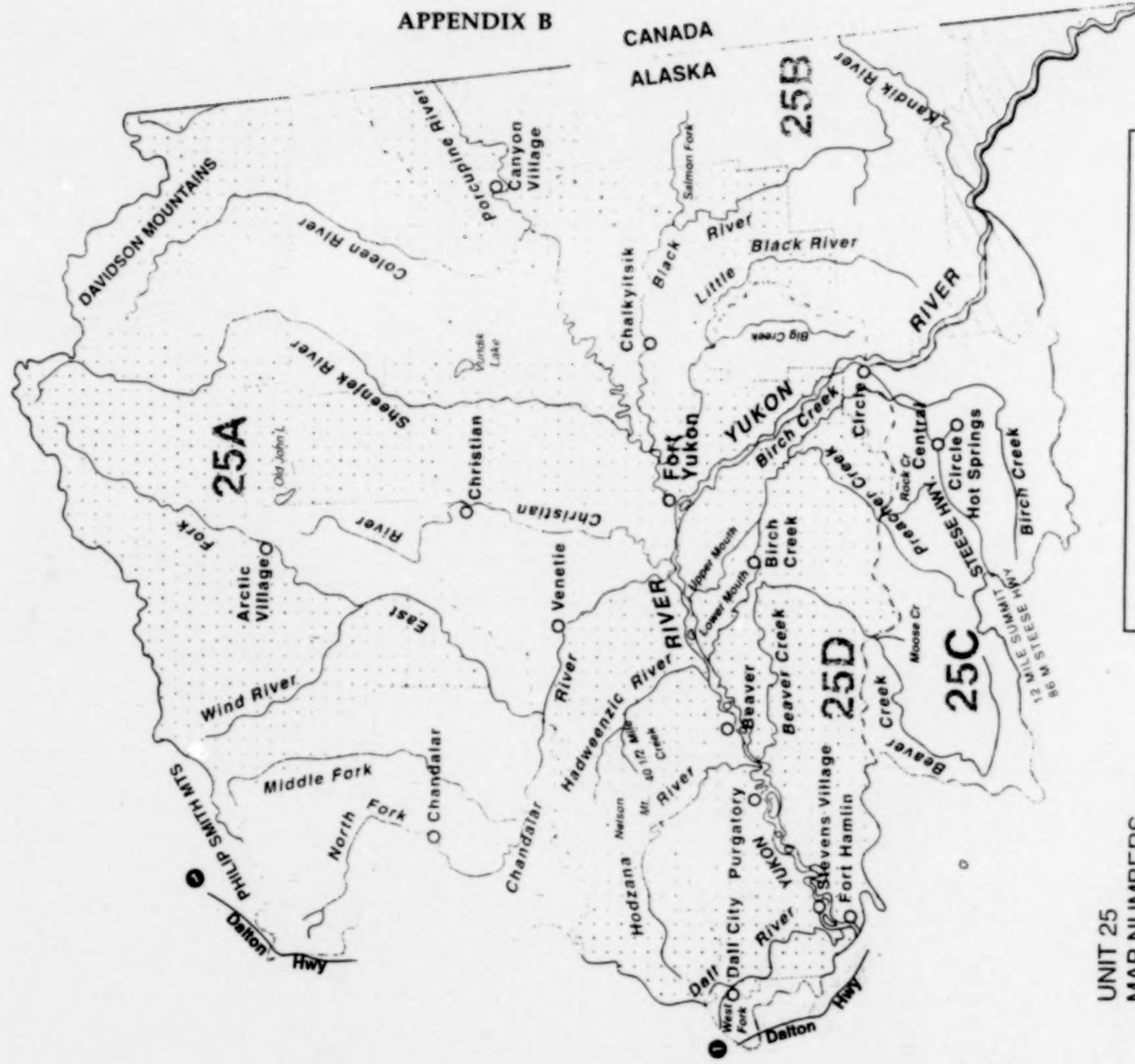
**ALASKA FISH & WILDLIFE FEDERATION
AND OUTDOOR COUNCIL, INC.**

Alaska 2nd Amendment Coalition	Fairbanks
Alaska Boating Association	Anchorage
Alaska Competitive Shooters Organization	Anchorage
Alaska Falconers Association	Juneau
Alaska Frontier Trappers Association	Palmer
Alaska Rifle Club	Eagle River
Alaska State PITA	Juneau
Alaska State Snowmobile Association	Anchorage
Alaskan Bowhunters Association, Inc.	Anchor Pt
Alaskan Marine Dealers Association	Anchorage
Alaskan Waterfowl Association	Anchorage
Anchorage Snowmobile Club, Inc.	Anchorage
Blacksheep Bowmen	Elmendorf AFB
Chitina Dipnetters	Fairbanks
Clear Sky Sportsmen's Club	Clear
Cleveland Peninsula Users Coalition	Ketchikan
Cook Inlet Archers	Anchorage
Delta Sportsmen's Association	Delta Junction
Fairbanks Practical Pistol Club	North Pole
Fairbanks Retriever Club	Fairbanks
Fairbanks Snow Travelers Association	Fairbanks
FNAWS/Alaska Chapter	Anchorage
Golden North Archery Association	Fairbanks
Interior AK Gun Dog Association	Fairbanks
Interior Alaska Airboat Association	Fairbanks
Interior Alaska Trail Riders Association	Fairbanks
Interior Alaska Wildlife Association	Fairbanks
Juneau Rifle & Pistol Club	Juneau
Ketchikan Sports & Wildlife Club	Ketchikan
Ketchikan Volunteer Rescue Squad	Ketchikan
Matanuska Valley Sportsmen's Association	Palmer
Ruffed Grouse Society/SC AK Chapter	Anchorage
Safari Club International/AK Chapter	Anchorage

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Safari Club International/Kenai Chapter	Soldotna
Sitka Sportsmen's Association	Sitka
Slana Alaskans Unite	Slana
South Peninsula Sportsmen's Association	Homer
Stikine Sportsmen's Association	Wrangell
Tanana Valley Rifle & Pistol Club	Fairbanks
Tanana Valley Sportsmen's Association	Fairbanks
Territorial Sportsmen, Inc.	Juneau
Tok Shooter's Association	Tok
Tongass Sportfishing Association	Ketchikan

APPENDIX B



(As defined in Alaska Admin. Code
tit. 5, 92.450)

APPENDIX B